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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

KT Health, LLC , a Delaware limited liability company, Plaintiff, v. Walmart Inc. , a corporation, Defendant.	Civil No. <u>2:20-cv-00366-DAK</u> Complaint JURY DEMANDED District Judge <u>Dale A. Kimball</u>
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Plaintiff KT Health, LLC (“KT Health”) complains against defendant Walmart Inc. (“Walmart”) for the causes of action alleged as follows:

THE PARTIES

1. KT Health is a limited liability company duly organized and existing under the laws of the State of Delaware, with its principal place of business located at 584 East 1100 South, Suite 4, American Fork, UT 84003.

2. Walmart is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business located at 708 SW 8th Street, Bentonville, AR 72716.

JURISDICTION AND VENUE

3. This is a civil action for trade dress and trademark infringement under Section 43 of the Lanham Act, Title 15 U.S.C. § 1125(a).

4. This is also a civil action for deceptive trade practices arising under Utah Code Ann. § 13-11a-1, *et seq.*

5. This is also a civil action for unfair competition arising under Utah Code Ann. § 13-5a-101, *et seq.*

6. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1338(a), and 15 U.S.C. § 1121. This Court has supplemental and related-claim jurisdiction over the state law claims pursuant to 28 U.S.C. § 1338(b) and 28 U.S.C. § 1367.

7. Walmart is registered to do business in Utah as a foreign corporation.

8. Walmart engages in retail and wholesale business, offers an assortment of merchandise and services in retail and wholesale stores in each of the fifty states in the United States, as well as in Puerto Rico, and owns and operates 53 Walmart stores in Utah alone.

9. Walmart owns a product line or brand called the Equate Brand, under which it sells many of its consumer products that are purportedly comparable to name-brand products, but that are sold at lower prices than their counterpart name-brand products (“Equate Products”).

10. Walmart advertises, markets, and sells its products, including its Equate Products, to consumers through its Walmart stores, including consumers within the State of Utah.

11. Walmart's promotion, marketing, and sales of its Equate Products in its stores and online contribute to the acts of infringement alleged herein.

12. Walmart also advertises, markets, and sells its products, including the Equate Products, through <https://www.walmart.com/> (the "Walmart Online Store"), which is available to consumers within the State of Utah.

13. The Walmart Online Store allows consumers to order Walmart's products, including the Equate Products, and have them shipped to Utah.

14. Alternatively, the Walmart Online Store allows consumers, including consumers in Utah, to order Walmart's products, including the Equate Products, and then pick them up at a physical store near their home.

15. Walmart's promotion, marketing, and sales of the Equate Products in the Walmart Online Store contribute to the acts of infringement alleged herein.

16. KT Health alleges on information and belief that Walmart has sold, contracted for the sale of, or intends to sell the Equate Products within the State of Utah through its Walmart stores and through the Walmart Online Store.

17. This Court's exercise of personal jurisdiction over Walmart is consistent with the Constitutions of the United States and the State of Utah and Utah Code Ann. § 78-27-22 *et seq.*

18. Venue is proper in this judicial district under at least 28 U.S.C. §§ 1391.

BACKGROUND

I. KT Health's Iconic Products, Trademark, and Trade Dress

19. KT Health is a world leader in the sports-medicine products industry, and distributes its products worldwide to individuals, medical professionals, and teams through major retailers, specialty sports stores, medical distributors, and team distributors, among other distribution channels.

20. Since 2008, KT has revolutionized the sports medicine industry with the introduction of the most advanced and recognized kinesiology tape and recovery products.

21. KT Health markets and sells high-quality kinesiology tape with unique and iconic designs in the United States and throughout the world.

22. KT Health offers a variety of kinesiology tape, including KT Tape® Cotton™, and KT Tape Pro® in a variety of colors and packaging, examples of which are pictured below:






KT Tape® Cotton™ Black KT Tape® Cotton™ Beige KT Tape® Cotton™ Pink







KT Tape Pro® Black KT Tape Pro® Beige KT Tape Pro® Pink

23. KT Health's packaging for its kinesiology tape products, including KT Tape[®] Cotton[™], and KT Tape Pro[®], contains many design elements which, both individually and collectively, create an overall visual impression to inform customers that KT Health is the source of the goods ("KT Trade Dress"). Several examples of the design elements of the KT Trade Dress are as follows:

<u>KT Health Product Pictures</u>	<u>Description</u>
	<p>a. A rectangular product box with a black, orange, and white color scheme.</p> <p>b. A left-facing female athlete with her hair drawn back, dressed in a sleeveless and cut-off top, wearing kinesiology tape on her shoulder, taking up most of the right side of the front panel of the package.</p>

	<p>d. A box design with a front upward-extending flap, side upward-extending flap(s), and a back upward-extending flap.</p>
	<p>e. A stylized image of a running person shown on the back panel of the product box.</p> <p>f. The running person facing the right side of the back panel and situated on the left of the back panel with white/black wording on the right side of the back panel.</p> <p>g. The running person's foot touching the ground while the other foot extends out behind.</p>

	<p>h. A rectangular cut-out window on the right panel of the product box.</p>
	<p>i. The appearance of the left side panel, which is predominately composed of white text on a black or orange background, with a list of benefits.</p>
	<p>j. The rounded corners of the KT Health kinesiology tape products.</p>
	<p>k. The size, length, and shape of each of KT Health's strips of kinesiology tape.</p>
	<p>l. A pattern on KT Health's KT TAPE PRO® kinesiology tape.</p>
	<p>m. The adhesive in a wave pattern on the back of the kinesiology tape.</p>

24. Each of the design features that make up the KT Trade Dress constitute a design choice not driven solely by function.

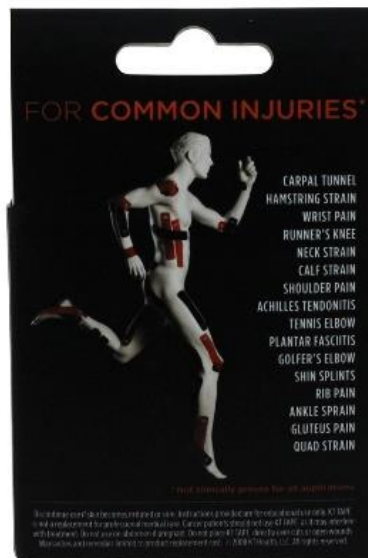
25. KT Health is the owner of U.S. Trademark Registration Number 6,019,311 (“KT Trademark”). The KT Trademark was first used in commerce at least as early as May 31, 2011.

26. The KT Trademark is a stylized depiction of a side body profile of a gray mannequin running:



KT Trademark

27. KT Health uses the KT Trademark on its products and in connection with its marketing, as a designation of the source of its products, an example of which is shown below:



28. KT Health’s use of its KT Trademark reinforces the association of the KT Trade Dress with the source of KT Tape products in the minds of consumers.

29. KT Health uses the KT Trade Dress, and the KT Trademark in interstate commerce in connection with the sale and advertising of its KT Tape products nationwide.

30. By using the KT Trade Dress and the KT Trademark, KT Health has developed significant and valuable goodwill in the KT Trade Dress and the KT Trademark.

31. Numerous other kinesiology tapes are marketed and sold in the marketplace without incorporating the elements of the KT Trade Dress either individually or collectively and without incorporating the KT Trademark.

32. KT Health first marketed and sold kinesiology tape with the KT Trade Dress and the KT Trademark to the public at least as early as 2011.

33. KT Health has continuously used the KT Trade Dress and the KT Trademark in connection with its KT Tape products since at least as early as 2011.

34. The KT Trade Dress and the KT Trademark have been unique to KT Tape products and uniquely associated with the source of KT Tape products in the minds of consumers since at least as early as 2011.

35. Since initially offering its products with the KT Trade Dress and the KT Trademark, KT Health has spent millions of dollars on advertising and marketing in order to showcase the unique and iconic designs of its products and to associate the KT Trade Dress and the KT Trademark with the source of KT Tape products in the minds of consumers.

36. Additionally, KT Tape products with the KT Trade Dress and the KT Trademark have been showcased and featured on national television programs, including Good Morning America on ABC Network, and in national newspapers, including the *Wall Street Journal* and the *New York Times*.

37. KT Tape was also an official sponsor of the US Olympic and Paralympic teams in the Rio 2016 and PyeongChang 2018 Games. KT Tape's athlete sponsors have included gold medalists James Harden and Kerri Walsh Jennings.

38. KT Tape is the official kinesiology tape of US Soccer and sponsored the US women's world cup champion team.

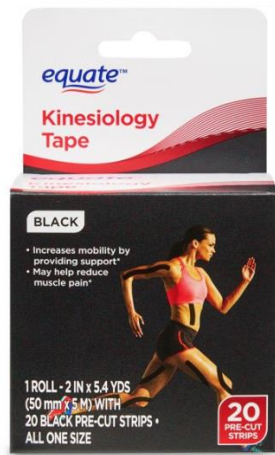
39. KT Tape is also the official kinesiology tape of Team USA and five other National Governing Bodies including USA Cycling, US Speedskating, USA Track & Field, USA Triathlon, and USA Wrestling.

40. As a result of KT Health's continuous use of the KT Trade Dress and the KT Trademark, including advertising, marketing, and sales utilizing the KT Trade Dress and the KT Trademark, the KT Trade Dress and the KT Trademark have become assets of substantial value to KT Health as distinctive indications of the origin and quality of KT Tape products.

II. The Walmart Equate Products

41. Walmart is unlawfully profiting from KT Health's success and goodwill associated with KT Tape products by marketing and selling kinesiology tape in packaging that incorporates the KT Trade Dress, the KT Trademark, and other words or devices that are confusingly similar to or are a colorable imitation of the KT Trade Dress and the KT Trademark, (hereinafter, the "Accused Products").

42. The Accused Products include Walmart's products marketed as "Equate™ Cotton Kinesiology Tape" and "Aso Corporation Equate™ Copper Kinesiology Tape":



Equate™ Cotton Kinesiology Tape



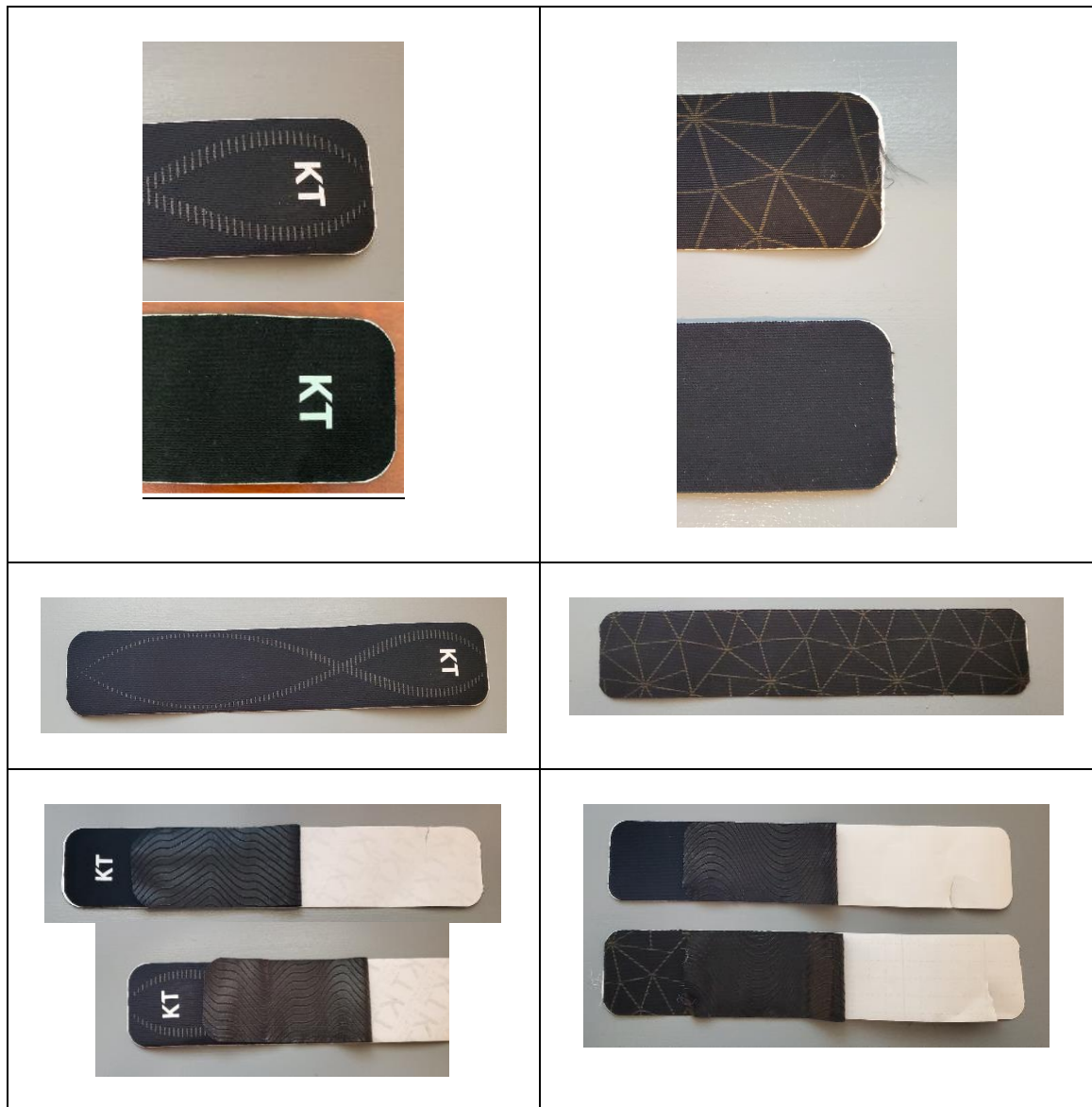
Aso Corporation Equate™ Copper Kinesiology Tape

43. Walmart copied the distinctive KT Trade Dress and KT Trademark for use in the marketing and sale of the Accused Products.

44. Without authorization from KT Health, Walmart has improperly incorporated the KT Trade Dress, the KT Trademark, and other words or devices that are confusingly similar to or are a colorable imitation of the KT Trade Dress and the KT Trademark into the Accused Products, several examples of which are shown below:

KT Tape® Cotton™ Black	Accused Products





45. Walmart's incorporation of the KT Trade Dress, the KT Trademark, and other words or devices that are confusingly similar to or are a colorable imitation of the KT Trade Dress and the KT Trademark into the Accused Products is likely to cause confusion, mistake, or deception, as those consumers encountering the Accused Products will mistakenly believe that the Accused Products are sourced, sponsored, endorsed, approved by, or connected with KT Tape products, when, in fact, they are not.

46. On information and belief, the materials used to manufacture the Accused Products, including the adhesive incorporated therein, do not meet the high standards and quality that customers have come to expect from the KT Tape products.

47. On information and belief, consumers that purchase the Accused Products are not satisfied with the performance of the Accused Products, causing them to turn away from kinesiology tape entirely, rather than purchase genuine KT Tape products in the future.

48. Walmart sells the Accused Products at a price point that is significantly lower than the price of KT Tape products. By selling the Accused Products, which are confusingly similar to or are colorable imitations of KT Tape products, at a reduced price, Walmart is diverting customers away from KT Tape products, eroding KT Health's price point for KT Tape products, and tarnishing KT Health's reputation as a provider of high quality products.

49. Walmart's actions have caused, and continue to cause, KT Health extensive and irreparable harm, including damage to the value and goodwill of the KT Trade Dress and the KT Trademark.

50. In addition to the significant financial damage that KT Health has, and is, suffering as a result of Walmart's actions, KT Health is suffering immediate and irreparable harm.

FIRST CLAIM FOR RELIEF
Trade Dress Infringement

51. KT Health re-alleges and incorporates the foregoing paragraphs as though fully set forth herein.

52. Walmart's use of the KT Trade Dress in the Accused Products is deceptive and likely to cause mistake and confusion to consumers regarding whether Walmart's goods and services originate from KT Health, or are sponsored, or approved of, by KT Health.

53. By its aforementioned acts, Walmart has infringed KT Health's rights in the KT Trade Dress in violation of at least Section 43 of the Lanham Act, 15 U.S.C § 1125(a).

54. KT Health alleges on information and belief that Walmart's acts have been willful and in conscious disregard of KT Health's rights in the KT Trade Dress.

55. Walmart's actions have already caused, and continue to cause, KT Health financial damage and damage to the value and goodwill of the KT Trade Dress.

56. KT Health has suffered and will continue to suffer irreparable injury for which KT Health has no adequate remedy at law.

57. KT Health is entitled to damages in an amount to be established at trial.

58. Pursuant to Section 34 of the Lanham Act, 15 U.S.C. § 1116, KT Health is entitled to an order of this Court enjoining Walmart, its officers, agents, and employees from using the KT Trade Dress or other words or devices confusingly similar to the KT Trade Dress.

SECOND CLAIM FOR RELIEF
Trademark Infringement of the KT Trademark

59. KT Health re-alleges and incorporates the foregoing paragraphs as though fully set forth herein.

60. Walmart's unauthorized use of the KT Trademark in the Accused Products is deceptive and likely to cause mistake and confusion regarding whether Walmart's goods and services originate from KT Health, or are sponsored, or approved of, by KT Health.

61. By its aforementioned acts, Walmart has infringed KT Health's rights in the KT Trademark in violation of at least Section 43 of the Lanham Act, 15 U.S.C § 1125(a).

62. KT Health alleges on information and belief that Walmart's acts have been willful and in conscious disregard of KT Health's rights in the KT Trademark.

63. Walmart's actions have already caused, and continue to cause, KT Health financial damage and damage to the value and goodwill of the KT Trademark.

64. KT Health has suffered and will continue to suffer irreparable injury for which KT Health has no adequate remedy at law.

65. KT Health is entitled to damages in an amount to be established at trial.

66. Pursuant to Section 34 of the Lanham Act, 15 U.S.C. § 1116, KT Health is entitled to an order of this Court enjoining Walmart, its officers, agents, and employees from using the KT Trademark or other words or devices confusingly similar to the KT Trademark.

THIRD CLAIM FOR RELIEF Unfair Competition

67. KT Health re-alleges and incorporates the foregoing paragraphs as though fully set forth herein.

68. Walmart's conduct as alleged is in violation of Utah Code Ann. § 13-5a-101 *et seq.*

69. KT Health alleges on information and belief that Walmart's acts have been willful and with knowledge that Walmart would be unlawfully and unfairly profiting from the goodwill associated with KT Health and its rights in the KT Trade Dress and the KT Trademark.

70. Walmart's actions have led to a material diminution in value of the KT Trade Dress and the KT Trademark.

71. KT Health has been injured by Walmart's infringement of the KT Trade Dress and the KT Trademark.

72. Pursuant to Utah Code Ann. § 13-5a-103, KT Health is entitled to damages, costs, attorneys' fees, and punitive damages from Walmart for its unfair competition.

FOURTH CLAIM FOR RELIEF
Deceptive Trade Practices

73. KT Health re-alleges and incorporates the foregoing paragraphs as though fully set forth herein.

74. Walmart, by its actions as alleged herein, has caused a likelihood of confusion or of misunderstanding as to the source of its products and services and has thereby engaged in a deceptive trade practice, pursuant to Utah Code Ann. § 13-11a-3(1)(b).

75. Walmart's conduct as set forth hereinabove gives rise to a cause of action for deceptive trade practices and related wrongs under the statutory and common law of the State of Utah, including at least Utah Code Ann. § 13-11a-4(2)(a).

76. KT Health alleges on information and belief that Walmart has engaged in deceptive trade practices against KT Health in willful and deliberate disregard of KT Health's rights and those of the consuming public.

77. By reason of Walmart's acts, KT Health has suffered damage and irreparable harm.

78. Accordingly, KT Health is entitled to injunctive and monetary relief against Walmart, pursuant to at least Utah Code Ann. § 13-11a-4(2)(a) and (b).

PRAYER FOR RELIEF

WHEREFORE, KT Health prays for entry of a final order and judgment as follows:

A. Injunctive relief, pursuant to Section 34 of the Lanham Act, 15 U.S.C. § 1116, enjoining Walmart, its officers, agents, servants, employees, and all those persons in active concert or participation with any of them from engaging in further acts of trade dress and infringement of KT Health's rights in the KT Trade Dress and the KT Trademark;

B. An order, pursuant to Section 36 of the Lanham Act, 15 U.S.C. § 1118, for Walmart to deliver up for destruction all containers, labels, signs, prints, packages, wrappers, receptacles, and advertisements, in the possession, custody or under the control of Walmart, bearing the KT Trade Dress, the KT Trademark, or words or devices that are confusingly similar to or a colorable imitation of the KT Trade Dress or the KT Trademark;

C. Injunctive relief enjoining Walmart, its officers, agents, servants, employees, and all those persons in active concert or participation with any of them, from engaging in further deceptive trade practices, pursuant to Utah Code Ann. § 13-11a-4(2)(a);

D. An award of damages and costs and Walmart's profits for Walmart's infringement of the KT Trade Dress and the KT Trademark, pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117;

E. An award of damages, costs, attorneys' fees, and punitive damages for Walmart's acts of unfair competition, pursuant to Utah Code Ann. § 13-5a-103;

F. An award of damages, in an amount to be proven at trial, including at least the greater of KT Health's actual damages and \$2,000, for Walmart's deceptive trade practices, pursuant to Utah Code Ann. § 13-11a-4(2)(b);

G. An award of costs and attorneys' fees under Utah Code Ann. § 13-11a-4(2)(c);

H. As part of final judgment, a declaration that this is an exceptional case under 15 U.S.C. § 1117, and an award of KT Health's attorneys' fees; and

I. Such other and further relief as the Court may deem just and proper under the circumstances.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, KT Health demands trial by jury on all claims and issues so triable.

Dated: June 12, 2020

Respectfully Submitted,

DURHAM JONES & PINEGAR, P.C.

By: /s/ Larry R. Laycock

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KT HEALTH, LLC